SERVED: January 24, 1994

NTSB Order No. EA-4061

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of January, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. MARK A. BISHOP, Respondent.	)	Docket SE-11657

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Coffman, rendered at the conclusion of an evidentiary hearing on March 19, 1992.[1] By that decision, the law judge affirmed an order of the Administrator revoking respondent's medical certificate and suspending respondent's

[1]An excerpt from the hearing transcript containing the initial decision is attached. Respondent filed an appeal brief and the Administrator filed a reply.

airman certificate, including his Airline Transport Pilot rating, for 60 days, due to his alleged violations of sections 67.20(a)(1) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 67).[2] The Administrator maintains that respondent completed four successive medical certificate applications between June 1986 and January 1989, falsely answering "no" to the questions of whether he ever had any traffic or other convictions. Because respondent pleaded guilty in March of 1986 to the alcohol-related offense of Driving While Ability Impaired, the Administrator asserts, he intentionally provided false information on his medical certificate applications.

The facts are fairly simple. In 1986, respondent was living and working in New York State, but retained a Pennsylvania driver's license. Respondent was pulled over in March of that year in New York and asked by two police officers to take a breathalyzer test. He twice took the test, both times registering a .12 blood alcohol level. Subsequently, respondent pleaded guilty to Driving While Ability Impaired and paid a $280 fine. Although his driving privileges in New York State were suspended for 90 days, his Pennsylvania driver's license remained unaffected, since there was not a comparable offense in the state of Pennsylvania.

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[2]This section reads, in pertinent part:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made -

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

The attorney who represented respondent on the driving offense testified at the hearing in the instant case, stating that he had advised respondent that the offense would only affect his driving privileges in New York.[3] Respondent claims that based on this advice, he believed he was answering truthfully all the questions on his application for a medical certificate: "I was under the impression that a traffic conviction was not to be entered into my record whatsoever so there was nothing to report." Tr. at 53. In consecutive applications dated June 27, 1986; December 12, 1986; December 3, 1987; and January 6, 1989, respondent consistently omitted any reference to the New York traffic offense.

After consideration of the briefs of the parties and the entire record, the Board concludes that safety in air commerce or air transportation and the public interest require the affirmation of the law judge's decision to uphold the Administrator's order.

On appeal, respondent makes several arguments. First, he asserts that the law judge should have dismissed the complaint based upon the reasoning of United States v. Manapat, 928 F.2d

[3]Specifically, the attorney testified as follows:

> I advised him that although his privilege to drive in New York might be affected, there would be no effect on his Pennsylvania license and explained to him that this was because in the State of Pennsylvania, there was no such offense as driving while impaired and they did not recognize it as being misconduct, and so it would have no effect on his license. Which is important, you can continue to drive anywhere besides New York.

Transcript (Tr.) at 38.

1097 (11th Cir. 1992). We need not discuss this argument at length, as we have clearly stated several times that the Board does not interpret Manapat to require a per se determination that the medical application is vague. The questions at issue are not confusing to a person of ordinary intelligence.[4] Administrator v. Barghelame and Sue, NTSB Order No. EA-3430 (1991). See also Administrator v. Krings, NTSB Order No. EA-3908 (1993); Administrator v. Sue, NTSB Order No. EA-3877 at 5 (1993).[5] In any event, respondent testified that he checked "no" on the form because he thought there was "nothing to report." Tr. at 53. He does not argue that the form was so confusing that he could not understand the question. Rather, he knew the form was seeking a report of traffic convictions but claims that he thought his conviction in New York for Driving While Ability Impaired was not on his record. Thus, Manapat is not relevant. See Administrator v. Beirne, NTSB Order No. EA-4035 (1993)(Manapat was not relevant

[4]The questions were part of a group of 26 with the instruction to check "yes" or "no" to indicate "Have you ever had or have you now any of the following:" "Record of traffic convictions;" and "Record of other convictions." FAA Form 8500-8 10-75, Exhibit A-2.

[5]Similarly, we do not accept respondent's reasoning that the Board should adopt "as guiding precedent" a law judge's decision to follow Manapat in two cases: Administrator v. Holey, SE-11727 (May 22, 1991) and Administrator v. Howard, SE-11512 (May 7, 1991). These initial decisions have not been subject to Board review and, thus, have no precedential value. 49 C.F.R. § 821.43. We will not, as respondent suggests, regard the Administrator's determination to refrain from appealing these cases as collaterally estopping the prosecution of the instant case. The prosecutorial discretion of the Administrator is not a proper matter for Board review. See Administrator v. Heimerl and Forrest, NTSB Order No. EA-4014 at 4 (1993), citing Administrator v. Greiner, 1 NTSB 874, 877 (1970).

because the respondent was not confused by the question on the form; instead, he believed that no conviction appeared on his record).

Finally, respondent argues that the Administrator did not prove knowing falsification and, therefore, the law judge acted arbitrarily when he decided that respondent violated FAR section 67.20(a)(1). All the elements of intentional falsification: falsity, materiality, and knowledge, must be present to prove the violation. Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976).[6] Respondent claims that when he answered the questions on the application form he believed he was doing so truthfully and, as such, he may not be found to have intentionally falsified the form. Citing Administrator v. Juliao, NTSB Order No. EA-3087 (1990), he asserts that the law judge must accept the testimony of his belief that he was answering the questions truthfully because, as he understood it, he had no record of a conviction. For the reasons that follow, we do not accept respondent's argument.

In Juliao, the respondent claimed that he did not read the questions on the application closely and so, mistakenly checked the wrong answer. The law judge found that the respondent should have known what was on the form, and so his answers were intentionally false. On appeal, the Board determined that

[6]In Hart v. McLucas, the issue was intentional falsification regarding a pilot certificate. It is germane to this discussion because section 67.20(a)(1) pertains to intentional falsification of an application for a medical certificate.

although the law judge could have inferred an intent to falsify by accepting the evidence and by rejecting the respondent's testimony, he could not assume intent from what the respondent should have known. Id. at 5.

The law judge in the instant case, however, listened to all the testimony, reviewed the evidence, and made a credibility determination that respondent knew he was not answering truthfully the question of whether he had any driving or other convictions.[7] The law judge did not believe respondent's explanation that even though he 1) had been arrested; 2) pleaded guilty to Driving With Ability Impaired; 3) paid a fine; and 4) lost his driving privileges in New York for 90 days, he nevertheless honestly believed there was no record of the conviction simply because it was not made part of his Pennsylvania driving record. The law judge's conclusion is not arbitrary or capricious and, therefore, must stand. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987).

[7]Respondent argues that the law judge's decision contains "no credibility finding wherein [the law judge] states that Respondent understood that he had a record of a traffic conviction or a record of any other conviction." Respondent's brief at 18-19. However, after summarizing the facts disclosed at the hearing, the law judge stated, "there's no question in my mind that Mr. Bishop knew he had a conviction." Tr. at 78-79. This statement is tantamount to an explicit credibility finding.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order and the initial decision are affirmed; and

3. The revocation of respondent's medical certificate and the 60-day suspension of respondent's ATP certificate shall begin 30 days after service of this order.[8]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[8]For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).